FILED
MAR - 2 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Ninth Circuit Court of Appeals No. 02-30326
District Court No. CR-02-11-GF-SEH

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

ALFRED ARNOLD AMELINE,

Defendant-Appellant.

AMICUS CURIAE BRIEF OF THE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS IN OPPOSITION TO THE UNITED STATES' PETITION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ANTHONY GALLAGHER
Federal Defender
JOHN RHODES
Assistant Federal Defender
DAVID C. AVERY
Research Attorney
Federal Defenders of Montana
P.O. Box 9380
Missoula, Montana 59807-9380
Telephone: (406) 721-6749
Counsel for Amicus Curiae

SUBMITTED: March 1, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

Page No.

STATUTES AND RULES

Ninth Circuit Court of Appeals No. 02-30326
District Court No. CR-02-11-GF-SEH

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

ALFRED ARNOLD AMELINE,

Defendant-Appellant.

AMICUS CURIAE BRIEF OF THE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS IN OPPOSITION OF THE UNITED STATES' PETITION FOR REHEARING EN BANC

//

//

//

//

//

I. Introduction

The Supreme Court's remedial opinion in *United States v. Booker*, 125 S. Ct. 738 (2005), altered the rules and methodology of federal sentencing. In *United States v. Ameline*, 2005 WL 350811, *5-6 (9th Cir. 2005), this Court held that, for cases on direct appeal, plain error is generally established for sentences incorporating enhancements not admitted or proved to a jury beyond a reasonable doubt. The government's petition for rehearing ("Petition") requests a far more restrictive standard. Because this Court's plain error analysis accords the proper level of protection to the fundamental rights at issue, especially in the context of this Court's historic requirement that available discretion must be exercised, the Court should deny the petition for rehearing en banc.

II. Interest And Identity Of Amicus Curiae

The Ninth Circuit Federal Public and Community Defenders provide representation to the indigent accused in each District of the Ninth Circuit pursuant to 18 U.S.C. § 3006A. Offices administered by the Defenders employ over 250 lawyers whose exclusive practice is the representation of financially eligible people both at trial and on appeal in this Circuit. The Defenders represent a substantial proportion of the 1,750 sentencing appeals filed in this Circuit in 2004.

The issue in this case affects a large number of defendants who have been represented or will be represented by Defenders on remand. The Defenders appreciate the Court's recognition of our interest in the outcome by authorizing the Federal Defenders of Montana, on behalf of all Defenders, to submit this brief. The Defenders support the Court's ruling for three basic reasons: 1) direct appeal defendants who suffer unconstitutional enhancements should be resentenced where the sentencing judge acted under the misconception that the guidelines were mandatory; 2) the government's approach provides insufficient protection for the substantial rights at issue and perpetuates unconstitutional sentences; and 3) this Court's approach not only assures that constitutional rights are vindicated, but it avoids a potential generation of ineffective assistance of counsel claims based on failure to anticipate all aspects of the *Booker* opinion.

III. ARGUMENT

A. Pre-*Booker* sentences involving enhancements implicate substantial rights such that remand is necessary for the proper exercise of a sentencing court's discretion.

As the Court found in *Ameline*, violation of *Blakely v. Washington*, 124 S.Ct. 2531, 2542 (2004), and *Booker* rights are errors that are plain for cases on direct appeal. Prejudice to "substantial rights" is demonstrated by the concrete difference resulting from the sentencing enhancements Mr. Ameline challenges. The interest in

liberty is a core value deserving of the highest degree of protection. See *Glover v. United States*, 531 U.S. 198, 3203 (2001) ("any amount of actual jail time" can constitute prejudice for the purposes of ineffective assistance of counsel).Mr. Ameline details that, by definition, any enhancement "must have affected the outcome" of the district court's pre-*Booker* (and pre-*Blakely*) sentencing.

Because "substantial rights" are at issue, a failure to remedy the pre-*Booker* sentence would impugn "the fairness, integrity or public reputation of judicial proceedings." *Ameline*, 2005 WL 350811, *6; *United States v. Hughes*, 396 F.3d 374, 381 (4th Cir. 2005); *United States v. Oliver*, 2005 WL 309934, *8 (6th Cir. 2005). *Ameline* recognized that,

> declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to performing the sentencing function ourselves. . . . Accordingly, it is the *truly* exceptional case that will not require remand for resentencing under the new advisory guideline regime. This is not such a case. The violation of Ameline's Sixth Amendment rights therefore warrants vacating his sentence and remanding for resentencing.

Ameline 2005 WL 350811, *6 (internal citation omitted)(emphasis in original). It is a miscarriage of justice to perpetuate an illegal sentence that increases punishment, even for a day, particularly where the Supreme Court has ruled unconstitutional the sentencing process that produced the sentence.

The need for resentencing is demonstrated by this Court's pre-Guideline precedent. In *United States v. Miller*, 722 F.2d 562 (9th Cir. 1983), the Court vacated a sentence imposed by a district court that categorically refused to accept single-count guilty pleas in multi-count cases, under the former Rule 11(e)(1)(C). In requiring the district court to rule individually, the Court stated that, "[t]he existence of discretion requires its exercise." *Miller*, 722 F.2d at 565 (citing *Dorszynski v. United States*, 418 U.S. 424 (1974)).

Likewise, in *United States v. Lopez-Gonzalez*, 688 F.2d 1275 (9th Cir. 1982), the district court had a policy of imposing the maximum available sentence if an aggravating fact – flight – was present in alien smuggling cases. The Court reversed for resentencing with the exercise of individualized discretion. *Id.* at 1276-77. The Court rejected the government's claim that the presentation of mitigating evidence at the initial sentencing sufficed, finding that both the letter and spirit of the law required the sentencing judge to assess individual facts and circumstances unhindered by a mechanical formula. See also *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (immigration decision reversed not for the manner in which discretion was exercised but for the failure to exercise available discretion).

B. Mr. Ameline's sentence was imposed in violation of the Sixth Amendment.

The government champions the Eleventh Circuit's "persuasive analysis" in *United States v. Rodriguez*, 2005 WL 272952 (11th Cir. 2005), which the government claims "expose[s] [the] shortcomings" of *Ameline*. (Petition, pp. 2 and 13.) The government offers no discussion of *Rodriguez*, other than the following quotation:

> the constitutional error whose prejudicial measure we take is not the use of extra-verdict enhancements. Their use remains a constitutional part of guidelines sentencing in the post-*Booker* era. The constitutional error is the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge ....

Id. at *9.

The *Rodriguez* analysis severs the *Booker* remedy from the Sixth Amendment violation. The Supreme Court did not fashion the remedy in a vacuum. It rectified a Sixth Amendment error. Indeed, it fashioned the remedy because Booker's sentence violated the Sixth Amendment. *Booker*, 125 S.Ct. at 758 ("we conclude that the constitutional jury trial requirement is not compatible with the Act . . . and that some severance and excision is necessary"). Likewise, it remanded Booker's case to the district court for resentencing because, in violation of the Sixth Amendment, his sentence was increased on the basis of judge-found (preponderance of the evidence) facts in the context of a mandatory Guidelines scheme, not because he demonstrated that he might have received a lower sentence under an advisory Guidelines scheme.

Id. at 769. The government fails to substantiate its urged severance of the *Booker* remedy from the Sixth Amendment violation.[1]

As detailed in the panel opinion, prejudice to his substantial rights has not only been demonstrated — it is self-evident. This Court does not stand alone. Two other circuits have reached the same result. *United States v. Milan*, 2005 WL 309934, *5 (6th Cir. 2005); *United States v. Hughes*, 396 F.3d at 380 (4th Cir. 2005). And two other circuits have recognized the importance of a district court's review of pre-*Booker* sentences, albeit under a different rationale. *United States v. Paladino*, 2005 WL 435430, *9 (7th Cir. 2005.); *United States v. Crosby*, 2005 WL 240916, *9-11 (2nd Cir. 2005) .

C. The failure to recognize the constitutional error of pre-*Booker* sentencing taints the government's analysis of the appropriate remedy.

The government seeks to avoid a discussion of Sixth Amendment error in order to persuade this Court that Mr. Ameline has not demonstrated a reasonable probability that his sentence would have been lower under the advisory scheme. Not only does such an analysis ignore the Sixth Amendment prejudice inherent in this

[1] In a brief filed with this Court last week, the U.S. Attorney for the District of Montana urges resentencing under *Booker*, arguing that "the remedial scheme should apply even if the sentence was not imposed in violation of the rights of the Sixth Amendment." See *United States v. Edwards*, CA 04-30451, Opening Brief at 12. Here, the sentence violates the Sixth Amendment, yet the government resists resentencing.

case, but it also presumes that a defendant seeking plain error review must always concretely demonstrate prejudice. Case law is to the contrary.

1. The government's reliance on *Dominguez Benitez* is misplaced because that case involved non-constitutional error related to a Rule 11 guilty plea proceeding, not a constitutional sentencing error.

Not all errors require a defendant to make a showing of prejudice. *United States v. Olano*, 507 U.S. 725, 734 (1993) ("In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial.") (underline added); and *United States v. Cotton*, 535 U.S. 625, 632 (2002) ("The third inquiry is whether the plain error 'affect[ed] substantial rights.' This usually means that the error 'must have affected the outcome of the district court proceedings.'") (quoting *Olano*, 507 U.S. at 734) (underline added). Rather than acknowledging this principle, the government offers a one-dimensional substantial rights test and then accuses this Court of "serious[ly] misapprehend[ing] the Supreme Court's plain error jurisprudence." (Petition, p. 2.) According to the government, under *Dominguez Benitez*, "[t]o satisfy the third requirement of Rule 52(b)," Mr. Ameline must show that "he would have received a lower sentence under the advisory Guidelines system." (Petition, p. 11.) The government, however, unduly elevates *Dominguez Benitez* from its Rule 11 context to the present constitutional setting.

Dominguez Benitez repeatedly emphasized the non-constitutional context of its plain error analysis. 124 S.Ct. at 2341 n. 10. Indeed, immediately before stating its holding, the Court stressed this distinction: it is "worth repeating, that the violation claimed was of Rule 11, not of due process." *Id.* at 2340. The Court thus purposely limited its holding to Rule 11: "We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* The government fails to recognize the difference between constitutional and non-constitutional errors.

Likewise, *Rodriguez* ignores the Supreme Court's instruction that a defendant's showing of "the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (underline added). Instead, *Rodriguez* confesses: "we don't know" what sentence the district court would impose under an advisory scheme; it "might have given Rodriguez a longer sentence, or he might have given a shorter sentence, or he might have given the same sentence.... We just don't know." *Rodriguez*, 2005 WL 272952, *9. *Rodriguez* effectively concedes that it cannot have the requisite confidence in the pre-*Booker* sentence. Accord *Hughes*,

396 F.3d at 381, n. 8 ("we simply do not know how the district court would" sentence).

The types of errors beyond that at issue in *Dominguez Benitez* fall into (at least) two categories: (1) "structural" errors, which so taint the framework of criminal proceedings that substantial rights are necessarily affected, *United States v. Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004); and (2) errors which justify a presumption of prejudice because, inherently, they present an exceptional difficulty for the defendant to demonstrate prejudice. *Olano*, 507 U.S. at 735 (there are "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice"); *United States v. Barnett*, 2005 WL 357015, *9-10 (6th Cir. 2005) (numerous citations omitted); *United States v. Perez*, 116 F.3d 840, 847 (9th Cir.1997) (en banc).

The point is not that the Sixth Amendment violation detailed by Mr. Ameline must be deemed structural or otherwise presumptively prejudicial in order to justify a remand for resentencing. The Sixth Amendment violation, and attendant prejudice, is manifest. See, e.g., *United States v. Portillo* 273 F.3d 1224, 1228 (9th Cir. 2001) ("[A] longer sentence undoubtably affects substantial rights.") (quoting *United States v. Anderson*, 201 F.3d 1145, 1152 (9th Cir. 2000)). Rather, the point is, even if the self-evident Sixth Amendment prejudice is momentarily set aside for the sake of argument, the government's demand — i.e., that Mr. Ameline demonstrate a

reasonable probability of a lower sentence under the advisory scheme — results from a legal misconception of substantial rights prejudice.

Dominguez Benitez is again illustrative. After observing that not all plain errors require a showing of prejudice, 124 S.Ct. at 2339, the Supreme Court held that a showing of prejudice was required, and was lacking on the fully developed record. In so holding, though, the Court emphasized that: (1) it limited its substantial rights holding to a Rule 11 context; (2) there is a "particular importance to the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt," *id.* at 2340; (3) the defendant did not argue that prejudice should be presumed, *id.* at 2339; (4) the relevant error was not constitutional, *id.* at 2340; and (5) the record necessarily lent itself to a determination of whether there was a reasonable probability that, absent the Rule 11 violation, the defendant would have gone to trial, *id.* at 2341.

The Rule 11 analysis is not particularly helpful in this markedly different context. The post-*Booker* plain error results from violation of constitutional rights, not procedural error. Relatedly, the "particular importance of the finality of guilty pleas" does not render sentencing a formality. Third, as detailed below, prejudice should be presumed. Which brings us to whether upholding a Sixth Amendment violation and depriving a sentence under the remedial advisory scheme, versus a Rule 11 violation, results in constitutional error.

The *Booker* advisory scheme was not fashioned in isolation. Rather, it was chosen so that enhancements resulting from judge-found facts will (prospectively) no longer violate the Sixth Amendment. *Booker*, 125 S.Ct. at 756-60 and 764. If the remedy is constitutional in effect, then denial of the remedy to Mr. Ameline is unconstitutional in effect – i.e., without it, his sentence remains unconstitutional. Thus, the deprivation of a post-*Booker* sentence in this case would affirm an unconstitutional sentence, thereby perpetuating prejudice to Mr. Ameline's substantial rights.

2. Prejudice should be presumed based on the constitutional violation and the unexercised discretion available post-*Booker*

The present record makes it unduly burdensome for Mr. Ameline to demonstrate a reasonable probability that he would have received a lower sentence under the remedial advisory scheme. *Barnett* is most instructive on this point. 2005 WL 357015, *9-11. "Courts have presumed prejudice, and have thus found the third prong of plain error review, in cases where the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court would have been different had the error not occurred." *Id.* at *9. Thus, not only have Mr. Ameline's substantial rights been demonstrably prejudiced by a Sixth Amendment violation, but further prejudice should be presumed. It is unjustifiably

burdensome to require him to demonstrate whether he might have received a lower sentence under the advisory scheme created to cure the Sixth Amendment error.

3. The panel properly exercised its discretion to remedy the plain error in Mr. Ameline's sentence thereby avoiding impugning the fairness, integrity, and/or public reputation of judicial proceedings.

As *Ameline* duly notes at the outset of its fourth-prong analysis, the Supreme Court has already stated that the Sixth Amendment violation at issue here impugns the fairness of sentencing proceedings. 2005 WL 350811, *5-6 (quoting *Blakely*, 124 S.Ct. at 2542.). In contrast, the government's fourth-prong argument is fatally premised on its misdiagnosis of the error and prejudice at issue. (Petition, pp. 15, 16 and 17.) The flaw in the government's argument is also reflected in its invocation of the reasonableness standard of appellate review at this stage. The reasonableness standard of review is part of the overall Sixth Amendment remedy. *Booker*, 125 S.Ct. at 764-66. It presupposes a district court's implementation of the advisory regime, which is yet to happen here. *Hughes*, 396 F.3d at 381 n. 8 ("[T]he determination of reasonableness depends not only on an evaluation of the sentence imposed but also the method employed in determining it.").

The government chastises the Court for refusing to conclude that the district court would impose the same sentence under either a mandatory or advisory Guidelines system. (Petition, pp. 17-18.) The government ignores that it is

"impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guidelines sentence." *Crosby*, 2005 WL 240916, *28-29; accord *Barnett*, 2005 WL 357015, *10. A quick review of the record confirms this fact. The sentencing hearing overwhelmingly focused on the decisive fact under mandatory Guidelines – drug quantity. From beginning to end, the parties and the court focused on that issue. (Government Supplemental Excerpt of Record 4-107.)

While drug quantity remains a factor under an advisory system, it is no longer decisive. Under 18 U.S.C. § 3553(a), the sentencing court is required to consider a far broader range of facts. These include factors fundamental to the human condition, such as the age of the defendant, education and vocational skills, mental and emotional conditions, physical condition, employment record, and family ties and responsibilities, which the Guidelines previously withheld from consideration. U.S.S.G. § 5H.

The holistic sentence, that encompasses all § 3553(a) factors (including factors previously prohibited by the Guidelines), may necessarily be lower, because the Guideline range did not permit consideration of many factors. Now, per 18 U.S.C. § 3661, there is no limitation as to what the sentencing court may consider.

With such a significant change, it makes little sense to require proof of the district court's dissatisfaction with the Guideline sentencing range (or that it would have imposed a different sentence had it considered no-longer forbidden factors) in order to establish prejudice. Prior to *Booker*, the appellate courts had repeatedly instructed district courts to comply with the Guidelines, which, pre-*Blakely*, were deemed constitutional. See, e.g., *United States v. Ochoa*, 311 F.3d 1133, 1134-36 (9th Cir. 2002). Thus, the panel followed the Supreme Court's instruction that "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Williams v. United States*, 503 U.S. 193, 205 (1992). Put differently, "[g]uessing at what a district court judge would have done had she known the greater discretion afforded by *Booker* affects the public reputation of judicial proceedings." *Barnett*, 2005 WL 357015, *15 (Gwin, J., concurring). Contrary to the government's urging, for this Court, "it is improper to speculate." *United States v. Hines*, 2005 WL 280503, *8 (6th Cir. 2005); accord *United States v. Castillo-Casiano*, 198 F.3d 787, 791 (9th Cir. 1999).

The fact that Mr. Ameline received a sentence above the low-end of the mandatory Guidelines sentencing range does not mean his sentence would not be reduced upon resentencing under an advisory system. *Paladino*, 2005 WL 435430, *8. A new sentencing hearing's focus will dramatically expand beyond the narrow

issue of drug quantity. The district court will judge Mr. Ameline as a person, not as a subject of mathematical calculations. Notably, the district court authorized Mr. Ameline's release and self-report to the Bureau of Prison, evidencing his trustworthiness and reliability. Mr. Ameline, moreover, remained employed during his release, not an easy achievement on an impoverished reservation. (ER 118.)

As *Rodriguez* confessed, "we just don't know" why the district court imposed a mid-range sentence. We do know that the court imposed a sentence within a much narrower range – the mandatory Guidelines range – than now permitted, and that it did so under constrained discretion. "A conscientious judge – one who took the guidelines seriously whatever his private views – would pick a sentence relative to the guideline range." *Paladino*, 2005 WL 435430, *8. Thus, the judge would sentence within the Guidelines range relative to other offenders within the same range, not relative to the statutory range considering all sentencing factors as the judge must now do. *Hughes*, 396 F.3d at 381, n. 8 ("the district court was never called upon to impose a sentence in the exercise of its discretion").

In sum, the government urges the Court to abandon its sound conclusion that affirming an unconstitutional sentence imposed under a mandatory guideline regime would undoubtedly jeopardize the fairness, integrity, or public reputation of judicial proceedings. *Ameline*, 2005 WL 350811, *6. As this Court recognized, it cannot

perform the sentencing function for the district court. This Court rightfully exercises such restraint because it cannot assume that the parties would not adduce new, now potentially relevant, sentencing evidence. It should not guess what sentence the district court might impose within the discretionary range of zero to 240 months based on the sentence imposed under the much narrower mandatory range. It cannot divine what factors the district court might be asked to consider that were formerly unlawful, strongly discouraged, or limited in relevance to the mandatory guideline range. Instead, *Ameline* exhibits this Court's sensible protection of the fairness, integrity and public reputation of judicial proceedings.

D. A remand for resentencing properly remedies the constitutional error and protects the liberty interests of individuals on direct appeal who deserve post-*Booker* sentencing.

This Court's analysis in *Ameline* comports with the decisions of at least two other circuits, and it prevents an unconstitutional sentence from lingering until its expiration. In imposing sentence, a district court is of course circumscribed by any statutory maximum or minimum sentence and the surviving aspects of the Sentencing Reform Act. Otherwise, in accordance with *Booker* and the mandate of 18 U.S.C. § 3553(a), a myriad of (theoretically unlimited) factors previously proscribed, or limited to relevance only within the Guidelines range, are now fully in play. Vacating and remanding, therefore, is the proper systemic remedy.

1. This Court, in vacating the sentence and remanding to the district court for resentencing like *Hughes* and *Oliver/Hines/Milan*, gives proper weight to the duties of the district court in adjudicating all of the relevant post-*Booker* sentencing factors.

The Fourth Circuit in *Hughes*, 396 F.3d at 381, and the Sixth Circuit in *United States v. Oliver*, 2005 WL 233779, *7, *Hines*, 2005 WL 280503, *8, and *Milan*, 2005 WL 309934, *4, recognize that an appellate court cannot de facto perform the sentencing function by presuming that resentencing would result in the same sentence. As in pre-Guidelines cases, sentencing will occur in the proper forum for considering all the § 3553(a) factors, unconstrained by the mechanical application of mandatory guidelines with channeled sentencing ranges.

In contrast, the government wants to deny an advisory scheme sentence to as many defendants as possible, even those who suffered the very Sixth Amendment violation that the advisory scheme cures. The government warns against " ... an avalanche of remand orders [that] would threaten to bring the criminal justice system to a complete standstill," which will place a serious strain on the resources of this Court. The government direly predicts that its own resources and those of the defense bar will be overtaxed. (Petition, pp. 3-4.)

This case implicates only those like-situated defendants still on direct appeal who failed to raise a Sixth Amendment challenge below; at the least, most if not all post-*Blakely* sentencings will have preserved this issue; and, given this Court's prescient first ruling in this case, most of those sentencings will have complied with the Sixth Amendment. The vast majority of the remaining cases will work their way through the appellate process within a year. Upon remand, sentencing courts will have an opportunity to exercise their discretion and impose constitutional sentences while considering all of the relevant factors in 18 U.S.C. § 3553(a), as detailed above, thus avoiding otherwise anticipated ineffective assistance of counsel claims for failing to anticipate all aspects of *Booker*.

2. *Rodriguez* and *Antonakopoulos* do not sufficiently recognize the rights at issue.

The government has submitted a Rule 28(j) letter claiming that *United States v. Antonakopoulos*, 2005 WL 407365 (1st Cir. 2005), endorses the government's arguments that: (1) the error at issue in this case is not the increase of Mr. Ameline's sentence on the basis of judge-found facts, but that the increase occurred within a mandatory scheme; and (2) Mr. Ameline has the burden of showing a reasonable probability of a lower sentence under the remedial advisory scheme. While *Antonakopulos* undertakes a more nuanced analysis than *Roriguez*, it ultimately

succumbs to the same fundamental error — i.e., severance of the remedy from the Sixth Amendment violation.

Thus, *Antonakopulos* initially recognizes that there are "different formulations, varying with the context, as to the content of the defendant's burden to show his "'substantial rights' have been affected," which at least allows the possibility of presumed prejudice. *Id.* at *8. But then *Antonakopulos* quickly adopts *Dominguez Benitez*' requirement that the defendant demonstrate a reasonable probability of a lower sentence under the advisory scheme never extended to him. *Id.* In order to justify this retreat, the *Antonakopulos* Court engages in analytical time-travel: as a result of the *Booker* remedy, "the maximum lawful sentence is the statutory maximum sentence, and because judicial fact-finding under advisory guidelines cannot increase that lawful maximum, judicial fact-finding now encounters no Sixth Amendment difficulties." *Id.* at *9 (quoting *Crosby* 2005 WL 240416, *3, n. 6) (underline added.) In other words, the *Booker* remedy somehow cures those sentences infected prior to its discovery, without actually administering the remedy.

3. *Crosby* and *Paladino* correctly assess the importance of the rights at issue, but then improperly assign further plain error review to district courts on remand.

Two circuits have adopted a general policy of remanding *Booker* cases to the district court for the limited purpose of announcing whether post-*Booker* sentencing

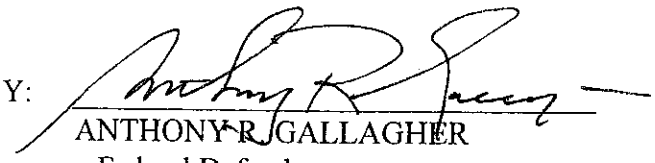
would result in a different sentence. *Paladino*, 2005 WL 435430, *10; *Crosby*, 2005 WL 240916,*11. This novel approach avoids the restrictive standard adopted in *Rodriguez*, which automatically "condemn[s] some unknown fraction of criminal defendants to serve an illegal sentence." *Paladino*, 2005 WL 435430, *11.

However, while the Second and Seventh Circuits correctly assess the importance of the rights at stake, they do not honor the traditional roles of appellate and district courts, nor do they provide adequate consideration to the differences in sentencing post-*Booker*. This Court's decision to vacate and remand for resentencing reflects the proper allocation of appellate and trial level responsibilities and assures sentences that comply with *Booker*. The "quick look" limited remand is not the constitutional sentencing process established in *Booker*. *Paladino*, 2005 WL 434430, *12 (Ripple, J., dissenting). The process must be constitutional for the sentence to be so. Equally fundamental, plain error review is performed by appellate courts, not by district courts judging themselves. Thus, the remand implemented by the Second and Seventh Circuits, while creative, lacks the legal soundness of this Court's jurisprudence, which honors the Sixth Amendment, the *Booker* remedy, the plain error doctrine, and the respective roles of appellate and district courts.

IV.CONCLUSION

The petition and the government's motion to stay should be denied.

RESPECTFULLY SUBMITTED this 1st day of March 2005.

BY: 

ANTHONY R. GALLAGHER
Federal Defender
District of Montana
JOHN RHODES
Assistant Federal Defender
DAVID C. AVERY
Research Attorney
Signing on behalf of all counsel listed below

FRANK MANGAN
Interim Federal Defender
Southern District California

F. RICHARD CURTER, III
Federal Public Defender
District of Alaska

QUIN A. DENVER
Federal Public Defender
Eastern District California

FRANNY A. FORSMAN
Federal Public Defender
District of Nevada

JOHN T. GORMAN
Federal Public Defender
District of Guam

JON SANDS
Federal Public Defender
District of Arizona

THOMAS W. HILLIER, II
Federal Public Defender
Western District Washington

ROGER PEVEN
Federal Defender
Eastern District of Washington & Idaho

BARRY J. PORTMAN
Federal Public Defender
Northern District of California

STEVEN T. WAX
Federal Public Defender
District of Oregon

PETER C. WOLFF, Jr.
Federal Public Defender
District of Hawaii

CERTIFICATE OF COMPLIANCE

I certify that this *AMICUS CURIAE* Brief complies with this Court Order of February 18, 2005, because it does not exceed 20 pages, excluding tables and certificates.

This brief complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word Perfect, Version 9, in Times New Roman 14.

DATED this 1st day of March, 2005.

By: _____

ANTHONY GALLAGHER
Federal Defender
JOHN RHODES
Assistant Federal Defender
DAVID C. AVERY
Research Attorney
Federal Defenders of Montana
P. O. Box 9380
Missoula, MT 59807-9380
(406) 721-6749
Counsel for Amicus Curiae

CERTIFICATE OF MAILING

The undersigned hereby certifies that on March 1, 2005, a copy of the foregoing Opening Brief has been placed in the United States Mail, postage prepaid, addressed to the following:

WILLIAM MERCER
United States Attorney
P.O. Box 1478
Billings, MT 59103

LORI HARPER SUEK
Assistant U.S. Attorney
P. O. Box 3447
Great Falls, MT 59403

MICHAEL A. ROTKER
United States Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., N.W. Suite 1264
Washington, D.C. 20530

STEVE HUBACHEK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008

BRIAN FAY
Angel, Coil & Bartlett
125 W. Mendenhall
Bozeman, MT 59715

FEDERAL DEFENDERS OF MONTANA